

STATE OF MICHIGAN
COURT OF APPEALS

RPM INTERNATIONAL TOOL & DIE, LTD.,
Plaintiff-Appellee,

UNPUBLISHED
January 17, 2012

v

BRP ACQUISITION GROUP, INC., d/b/a
BLACK RIVER PLASTICS,
Defendant-Appellant.

No. 301855
St. Clair Circuit Court
LC No. 09-003005-CK

Before: DONOFRIO, P.J., and STEPHENS and RONAYNE KRAUSE, JJ.

PER CURIAM.

Defendant appeals as of right the circuit court's order granting summary disposition for plaintiff pursuant to MCR 2.116(C)(10) in this breach of contract action. Because defendant failed to present documentary evidence in support of its claim that the parties did not reach an accord regarding the balance due on the purchase agreement, we affirm.

This dispute arises out of a 2007 agreement to purchase tools and mould flow reports. After paying \$244,172.90 of the \$376,964.50 purchase price, defendant withheld further payment because it was dissatisfied with plaintiff's workmanship and timeliness. Thereafter, plaintiff filed a complaint against defendant to obtain the outstanding balance. Plaintiff alleged that, because of defendant's workmanship complaints, the parties reached an accord in April 2009 whereby plaintiff agreed to give defendant a credit of \$46,500, bringing the outstanding balance to \$72,791.60.¹ Plaintiff further alleged that defendant acknowledged that it owed \$72,791.60 and paid \$10,000 toward the balance. In its complaint, plaintiff sought the remaining \$62,791.60.

Plaintiff moved for summary disposition under MCR 2.116(C)(10), arguing that there was no genuine issue of material fact that defendant owed \$62,791.60. In response, defendant denied that the parties had reached an accord and argued that factual issues existed for trial. The

¹ Similarly, in October 2007, plaintiff gave defendant a credit in the amount of \$13,500. That particular credit is not at issue in this appeal.

trial court agreed with plaintiff, granted summary disposition in plaintiff's favor, and entered a judgment against defendant in the amount of \$62,791.60.

We review de novo a trial court's decision on a motion for summary disposition. *Greene v A P Prod, Ltd*, 475 Mich 502, 507; 717 NW2d 855 (2006). In reviewing a motion under MCR 2.116(C)(10), this Court considers the affidavits, depositions, and other documentary evidence in the light most favorable to the nonmoving party. *Id.* Summary disposition is properly granted "if there is no genuine issue regarding any material fact and the moving party is entitled to judgment as a matter of law." *Rose v Nat'l Auction Group, Inc*, 466 Mich 453, 461; 646 NW2d 455 (2002).

As the moving party, plaintiff had the initial burden to support its position with documentary evidence. *Quinto v Cross & Peters Co*, 451 Mich 358, 362; 547 NW2d 314 (1996). In its complaint, plaintiff sought the amount due under the accord that the parties reached in April 2009. "An accord is a[s] much [a] binding contract as any other agreement. If it is repudiated or otherwise breached by the obligor, the injured party may sue on the original obligation or upon the accord at his election." *Ortiz v Travelers Ins. Co.*, 2 Mich App 548, 553-554; 140 NW2d 791 (1966). To establish a breach of contract claim, a plaintiff must prove: (1) that a contract existed, (2) that the terms of the contract required performance, (3) a breach, and (4) damages as a result of the breach. *Synthes Spine Co, LP v Calvert*, 270 F Supp 2d 939, 942 (ED Mich, 2003).

In support of its claim, plaintiff offered a copy of the original purchase order and the affidavit of Chris Vincent, one of plaintiff's principals, stating that the parties agreed that plaintiff would give defendant a significant credit in light of defendant's complaints, which brought the outstanding balance to \$72,791.60. Plaintiff also provided copies of e-mails in which the parties confirmed the agreement, defendant's accountant acknowledged that defendant owed \$72,791.60, and defendant's chief operating officer indicated that defendant would pay plaintiff as soon as the funds became available. In his affidavit, Vincent averred that defendant paid \$10,000 on June 10, 2009, but made no payments thereafter. Even viewed in the light most favorable to defendant, this evidence clearly shows that defendant agreed to the \$46,500 credit to resolve the outstanding issues and owed plaintiff \$62,791.60.

Once a party supports its claim for summary disposition under MCR 2.116(C)(10) with depositions, admissions, or other documentary evidence, the burden shifts to the nonmoving party to demonstrate that there exists a genuine issue of material fact for trial. *American Federation of State, Co, and Muni Employees v Detroit*, 267 Mich App 255, 261; 704 NW2d 712 (2005). "A genuine issue of material fact exists when the record, giving the benefit of reasonable doubt to the opposing party, leaves open an issue upon which reasonable minds might differ." *West v Gen Motors Corp*, 469 Mich 177, 183; 665 NW2d 468 (2003). "[T]he disputed factual issue must be material to the dispositive legal claim[.]" *Auto Club Ins Ass'n v State Auto Mut Ins Co*, 258 Mich App 328, 333; 671 NW2d 132 (2003). Further, "[a] litigant's mere pledge to establish an issue of fact at trial cannot survive summary disposition under MCR 2.116(C)(10)." *Maiden v Rozwood*, 461 Mich 109, 121; 597 NW2d 817 (1999). MCR 2.116(G)(4) "plainly requires the adverse party to set forth specific facts at the time of the motion showing a genuine issue for trial." *Id.* An affidavit providing mere conclusory allegations is insufficient to defeat a motion for summary disposition under MCR 2.116(C)(10). *Rose*, 466 Mich at 470.

In response to plaintiff's motion, defendant presented numerous 2007 e-mails and an affidavit from its chief operating officer. The e-mails were not material because they concerned defendant's complaints regarding plaintiff's workmanship and timeliness in 2007. In addition, the affidavit contains only conclusory statements that the parties did not reach an accord and that defendant's accountant's e-mail did not constitute an admission regarding the amount owed. These denials were insufficient to establish a genuine issue of material fact for trial. See MCR 2.116(G)(4); *Rose*, 466 Mich at 470. Thus, the trial court did not err by granting plaintiff's motion for summary disposition.

Affirmed. Plaintiff, being the prevailing party, may tax costs pursuant to MCR 7.219.

/s/ Pat M. Donofrio
/s/ Cynthia Diane Stephens
/s/ Amy Ronayne Krause